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No. 84-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

T.B. & Z. REALTY AND MANAGEMENT CORPORATION, and LESTER S. BARRITT,

Petitioners,

vs.

COTERIE SEVEN ENTERPRISES CORPORATION, an Illinois corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Were the rules and reasoning for the burden of proof enunciated by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* and *United States Postal Service v. Aikens* and as followed by the trial court sitting as the trier of fact and the Court of Appeals in their opinions correctly applied by these same courts as no new issue was presented.

PARTIES IN PROCEEDINGS BELOW

Plaintiff-Appellee-Cross-Appellant (Respondent herein)	Coterie Seven Enterprises Corporation
Defendants-Appellants Cross-Appellants (Petitioners herein)	T.B. & Z. Realty and Management Corporation and Lester S. Barritt
Defendant and Cross-Appellee	The Equitable Life Assurance Society of the United States

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Respondent Coterie Seven Enterprises Corporation respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Seventh Circuit.

COUNTERSTATEMENT OF FACTS

Due to the arguments as follows, Respondent Coterie Seven Enterprises Corporation deems unnecessary any counterstatement of facts.

REASONS WHY THE WRIT SHOULD BE DENIED

The Trial Court and the United States Court of Appeals specifically citing this Court's decisions in the *McDonnell Douglas Corp. v. Green* and *United States Postal Service v. Aikens* cases properly applied the burden of proof in this case.

ARGUMENT

Petitioners have sought to create a controversy where none exists. Petitioners attempt to rely upon an alleged improper apportionment of the burden of proof which they contend controverted the United States Supreme Court decision of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). However, both the District Court and the Seventh Circuit Court of Appeals specifically followed the dictates of the *McDonnell Douglas* case. In its decision of September 21, 1979, the District Court specifically noted *McDonnell Douglas* by stating on page 9:

> "that after a *prima facie* case is made out by the Plaintiff, the burden shifts to the Defendants to articulate some legitimate non-discriminating reason for their conduct." (p.802)

Further, in its opinion on remand the District Court noted the more recent case of *United States Postal Service v. Aikens*, ... U.S. ....., 51 U.S.L.W. 4354 (April 14, 1983) and stated:

> "We read [*Aikens*] as meaning that the bottom line in deciding such cases . . . is on the weight of the evidence as a whole." (p.4)

Similarly, the Seventh Circuit decision of October 25, 1982, stated clearly on page 5:

> "If it is established that racial discrimination was a motivating factor behind the challenged activities of Equitable, then the burden is passed to it to prove by a preponderance of the evidence that the same actions would have been taken and the same directions given its agents even had an unlawful purpose not been a motivating factor. If Equitable can prove this, Coterie Seven cannot attribute its injury to racial discrimination."

Petitioners suggest that by finding that Equitable acted without discriminatory reasons it is somehow an anomaly that T.B. & Z. and Barritt could be found guilty of any discriminatory conduct. This completely ignores the District Court's findings. T.B. & Z. and Barritt specifically negotiated extremely favorable lease terms to a supposedly undesirable tenant—the only concession being the elimination of Plaintiff's activities. The District Court's decision on remand page 5, specifically found that the Defendants T.B. & Z. and Barritt ". . . could be liable because of their own acts and statements in causing the tenant Cockney Pride to terminate Plaintiff's activities." The basis of the original judgment against these two Defendants as well as the judgment on remand was that T.B. & Z. and Barritt were acting independently of Equitable and were liable for their own racially discriminatory actions which were coerced upon and carried out by the tenant. There is no incongruity where one Defendant's actions are independent of another and one course of conduct is found discriminatory and the other innocent.

In summary, both the District Court and the Seventh Circuit Court of Appeals specifically recognized that the Plaintiff had the initial burden of proving its *prima facie* case. Both the District Court and the Seventh Circuit

Court found that after a *prima facie* case is presented, the burden shifts to the Defendant to show that there is a legitimate business reason for his actions. Both the District Court and the Seventh Circuit found the Defendants, T.B. & Z. and Barritt failed to establish a legitimate business reason for its racially discriminatory actions. However, both the District Court and the Seventh Circuit believed Equitable had not known of or authorized the conduct of their agents. Thus, after weighing the evidence as a whole the District Court, as a trier of fact, specifically found that T.B. & Z. and Barritt had failed to establish that their actions would have been the same had race not been a motivating factor.

CONCLUSION

For all the foregoing reasons stated above, Respondent, Coterie Seven Enterprises Corporation, prays the writ of certiorari be denied.

Respectfully submitted,

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